Hickory Homes, LLC v Goyal
2024 NY Slip Op 35079(U)
September 30, 2024
Supreme Court, Westchester County
Docket Number: Index No. 59055/2024
Judge: Thomas Quiñones
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER – I.A.S. PART

PRESENT: HON. THOMAS QUIÑONES, J.S.C.

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HICKORY HOMES, LLC,

Plaintiff(s)

-against-

DINESH GOYAL and MALINI GOYAL,

Defendant(s).

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DECISION AND ORDER

Index No. 59055/2024
Motion Sequence No. 1

The following papers were filed to the New York State Court Electronic Filing System (NYSCEF) as NYSCEF Doc. 9-18, 38-39 as Motion Seq. 1[1] and read on Plaintiff's motion filed by Order to Show Cause requesting, inter alia, (a) pursuant to CPLR § 6515 authorizing Plaintiff to post an undertaking in lieu of a notice of pendency filed by the Defendants on or about May 22, 2024 (NYSCEF Doc. No. 7); and (b) for such further relief as may be deemed just and proper.

Upon the foregoing papers, the motion is determined as follows:

Background Facts:

This action arises out of real estate contract dated October 10, 2023 for the sale of vacant land situated at 0 Hickory Lane, Scarsdale, New York 10583, sold by Plaintiff (as seller) to Defendants (as purchasers) in accordance with the terms set forth therein. In this action, Plaintiff requests, inter alia, a declaratory judgment that Plaintiff can retain the Defendants' contract deposit ($215,000.00) as a result of Defendants' breach of the parties' real estate contract without justification. Plaintiff's counsel states that said contract deposit remains in an attorney escrow account pending the outcome of this matter. The following factual account is alleged in Plaintiff's Amended Complaint.

Plaintiff alleges that the Defendants were unable to obtain the requisite Town building permit

[1] It is noted that Motion Seq. 2 was withdrawn (NYSCEF Doc. 40). Motion Seq. 3 filed Defendant and Cross-Motion #4 filed by Plaintiff will be adjudicated by separate decision following their respective motion return dates.

approvals for their plans for the proposed construction of a new home due to "Defendants' ill-advised plans [which] located their proposed home slightly encroaching within the Town's restricted buffer zone area." (Amended Complt. ¶¶15, 21). According to Plaintiff, the Defendants subsequently and repeatedly refused to schedule a closing as required by their contract. (Amended Complt. ¶ 22). Plaintiff eventually served a time-is-of-the-essence notice of a closing date for March 12, 2024, therein providing thirty days prior notice of such closing date. (Amended Complt. ¶ 23). Plaintiff alleges that, five days before the scheduled closing, Defendants claimed for the first time that a private third party had access rights to the Premises relieving them of any obligation to close. (Amended Complt. ¶ 24).

The crux of the dispute derives from the rider to the subject real estate contract, which provides that "[Defendants] shall not be obligated to close if any instruments of record … allow access or use rights to private third parties". (Exhibit "A", Rider II, ¶3). Plaintiff's complaint alleges that the Defendants rely on two erroneous positions to refuse to close title to the subject premises.

First, Plaintiff contends that Defendants claim that a 2011 Court Order [Hon. Smith, J.S.C.][2], settling a boundary line dispute between a prior owner of the Premises and a prior owner of a contiguous lot, granted the prior owner of the contiguous lot a non-transferable license to maintain shrubbery on a small area of the Premises near the neighbor's property boundary, created third party access to the Premises. (Amended Complt. ¶¶ 10, 11, 25). It is Plaintiff's contention that the Defendants are mistaken insofar as the prior owner of the contiguous lot extinguished the non-transferable license by transferring his interest in his contiguous lot by a deed dated May 15, 2023. Plaintiff contends that upon such transfer, the non-transferable license was thereby terminated. (Amended Complt. ¶13).

Second, Plaintiff contends that the Defendants also claimed they had no obligation to close because the 2011 Court Order further provides that a fence located inside the boundary of the Premises "shall not be placed any closer to the [neighbor's] property"[3]. However, the fence provision does not grant anyone access or use rights to the Premises. (Amended Complt. ¶26). Plaintiff further contends that the title company provided Defendants with a copy of the 2011 Court Order on October 19, 2023. (Amended Complt. ¶10). Defendants subsequently submitted their permit application, plans, and revised plans to the Planning Board. (Amended Complt. ¶¶ 14, 21). It is Plaintiff's position that Defendants no longer want the Premises because they could not secure Board approval for their "ill-advised" plans. It is only after Defendants failed to obtain Board approval that the Defendants invoked their position of third-party access as an excuse to refuse to close title to the Premises. (Amended Complt. ¶¶ 25). Plaintiff appeared on the noticed time-is-of-the-essence date (March 12, 2024) ready, willing, and able to close and tender the deed. (Amended Complt. ¶ 28). However, Defendants failed to appear for closing and breached their contract. (Amended Complt. ¶ 29). Plaintiff notified Defendants they were in default, had forfeited all rights under the contract, and

[2] *See*, NYSCEF Doc. 30.
[3] *Id.* at page 5.

Plaintiff commenced this declaratory action to retain the contract deposit on March 21, 2024. (Amended Complt. ¶¶ 31).

Plaintiff's Motion

Plaintiff filed a motion, by Order to Show Cause, for a court order pursuant to CPLR §6515 allowing Plaintiff to post an undertaking in the amount of an undertaking in lieu of a notice of pendency filed by Defendants on May 22, 2024 as NYSCEF Doc. No. 7.

Plaintiff points to Defendants' counterclaims (NYSCEF Doc. No. 6) which Plaintiff contends are limited to money damages: (i) return of their $215,000 contract deposit (in Defendant's first and second counterclaim) and (ii) refund of their expenses of title examination, survey, interest, costs, and disbursements (in Defendants' second counterclaim). Accordingly, Plaintiff's instant application pursuant to CPLR §6515 allowing Plaintiff to post an undertaking in lieu of the notice of pendency would permit Plaintiff to clear title to the Premises while preserving Defendant's claim to the return of the contract deposit. Plaintiff contends that this would enable the Plaintiff to sell the Premises as soon as possible without the encumbrance of the Defendant's "improper" notice of pendency. It is alleged that Plaintiff suffers continuing damages because the notice of pendency has prevented Plaintiff from selling the Premises because Plaintiff cannot provide any other prospective purchasers with title that is clear of the Defendant's notice of pendency.

As to the amount of any such undertaking, Plaintiff contends that the amount of the undertaking should be *de minimus*, as Plaintiff's counsel holds Defendants' $215,000.00 contract deposit in escrow pending the outcome of this action and Defendants' only unsecured claims are for expenses of title examination, survey, interest, costs, and disbursements.

Defendants' Opposition

Defendants oppose the cancellation of the notice of pendency. In the alternative, Defendants contend that if the Court deems an undertaking is a proper substitute, then such undertaking's principal amount should be more than a *de minimus* amount as recommended by Plaintiff.

First, Defendants contend that Plaintiff's order to show cause should be stayed or held in abeyance. Contemporaneously with filing this opposition, Defendants moved for summary judgment (Motions Seq. 3) which may ultimately render this motion as moot. Second, although Plaintiff states its motion is for substitution of the notice of pendency with an undertaking of an unspecified but *de minimus* amount, it casts doubt on the propriety of filing the constructive notice. Defendants refute Plaintiff's mischaracterization that Defendants' second counterclaim to foreclose a vendee's lien is a cause of action solely seeking recovery of monetary damages. To the contrary, Defendants contend that the filing of a notice of pendency in connection with a lawsuit to recover a down payment on a

contract for the sale of real property is appropriate. Notwithstanding, if the Court decides to exercise its discretion and cancel the notice of pendency, it should be conditioned on Plaintiff filing a bond for the full amount of the disputed funds with a reasonable surplus to cover potential interest and fees, as the Plaintiff's counsel who is holding the contract deposit is not a party to this action nor bound by any undertaking.

Upon due consideration of the motion papers, it is determined that the Plaintiff failed to establish entitlement to the requested relief. Plaintiff states that they are not challenging the validity of the vendee's lien. It is well-settled that the filing of a notice of pendency in connection with a lawsuit to recover a down payment on a contract for the sale of real property is appropriate. (*See,* CPLR §6501; *Wilson v Power House Dev. Corp.*, 12 AD3d 505, 505 [2d Dept. 2004]*; Tilden Development Corp. v. Nicaj*, 49 A.D.3d 629, 631 [2d Dept. 2008]).

Plaintiff's contention that Defendants' counterclaims solely seek monetary recovery is unavailing. Defendants' second counterclaim seeks to foreclose on the vendee's lien (*see,* NYSCEF Doc. 6 at ¶¶57-61). Where, as here, the Defendants (as the nonmoving party) assert counterclaims which seek, inter alia, to foreclose a vendee's lien to recover a downpayment made on a real estate contract (along with incidental expenses related thereto), the judgment demanded would affect title to real property and the notice of pendency is appropriate. (*Wilson v Power House Dev. Corp.*, 12 AD3d 505, 505 [2d Dept. 2004]).

Furthermore, Plaintiff failed to demonstrate that the circumstances presented warrants an exercise of this Court's discretion to substitute an undertaking for a notice of pendency under CPLR §6515. To the contrary, Plaintiff's proposal of vacating the vendee's lien in exchange for Plaintiff "posting" an undertaking in the amount of the $215,000.00 security deposit which is presently held by Plaintiff's counsel is insufficient. Moreover, such proposal defeats the purpose of the undertaking, which is to provide a source of recovery to the Defendants, as the nonmoving party, should they ultimately be successful in this case, for an amount which has yet to be established by the Defendants or determined by this Court. (*See generally,* CPLR §6315). Based on the foregoing, it is hereby

ORDERED that, Plaintiff's motion filed by Order to Show Cause requesting, inter alia, pursuant to CPLR § 6515 authorizing Plaintiff to post an undertaking in lieu of a notice of pendency filed by the Defendants is DENIED.

The foregoing constitutes the Decision and Order of this Court.

Dated: September 30, 2024
White Plains, New York

E N T E R :

HON. THOMAS QUIÑONES, J.S.C.

TO: *Filed to NYSCEF*